Rahimah bte Abdullah v Bank Bumiputra Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–59–91
ZAKARIA YATIM J
23 DECEMBER 1993

Banking *— Banker and customer — Lien — Whether bank had lien over fixed deposit of customer for debt owing to bank under other accounts*

Banking *— Banks and banking business — Deposits — Customer consented to bank's upliftment of deposit to pay indebtedness of third party — Whether bank's act in uplifting deposit was lawful — Whether bank had lien over deposit or whether deposit was security for third party's indebtedness*

The plaintiff was a customer of the defendant ('the Bank') and had deposited RM300,000 on fixed deposit with the Bank. The plaintiff alleged that on 11 October 1988, the Bank uplifted the fixed deposit without the plaintiff's consent or authority, and wrongfully transferred the sum of RM300,000 and credited it to the account of Malrich Holdings Bhd ('Malrich') pursuant to an alleged lien in favour of the Bank as a pledge for a loan granted to Malrich. The plaintiff contended that the Bank's action in uplifting the sum of RM300,000 in the fixed deposit and crediting it to the account of Malrich amounted to an act of conversion on the part of the Bank. The Bank denied the alleged act of conversion and alleged that the plaintiff had given her consent and approval to the Bank to uplift the RM300,000 in the fixed deposit to pay into the account of Malrich as directed by and agreed upon by the plaintiff in a document dated 22 October 1982 ('the plaintiff's letter'). The plaintiff applied to have the following points of law decided before trial of the action: (i) whether the fixed deposit receipt created a valid lien in favour of the Bank as security for an overdraft facility which was granted by the Bank to Malrich; and (ii) whether the act of the Bank in uplifting the fixed deposit on the ground that there was a lien was bad in law.

Held, dismissing the plaintiff's application:

(1) Any money credited into the account of a customer in a bank represents indebtedness by the bank to the customer. The bank has no lien upon its own indebtedness to the customer, even if the customer has another account in the same bank which is overdrawn or frozen. The bank, however, has a general lien on all securities deposited with the bank by a customer.

(2) Where the customer gives instructions in writing to a third party requesting the third party to pay the customer's bank the sum due and owing by the third party to the customer, that sum is subject to a lien. In the present case, it was clear that the fixed deposit per se was not subject to a lien, but if the fixed deposit were considered

together with the plaintiff's letter, it could be argued that the Bank had a lien on the money kept in the fixed deposit. The court was however more inclined to hold that the money kept in the fixed deposit was a security for the payment of any money owing by Malrich to the Bank. The plaintiff's letter also gave the Bank the liberty to withdraw the fixed deposit and apply the proceeds thereof to discharge the amount owing by Malrich without any reference to her.

(3) Therefore, if the amount in the fixed deposit was uplifted and credited to the account of Malrich in accordance with the terms of the plaintiff's letter, the Bank's action was valid in law.

[Bahasa Malaysia summary

Plaintif merupakan seorang pelanggan defendan ('Bank itu') dan telah menyimpan RM300,000 atas simpanan tetap dengan Bank itu. Plaintif telah mengatakan bahawa pada 11 Oktober 1988, Bank itu telah mengeluarkan simpanan tetap itu tanpa persetujuan atau kebenaran plaintif, dan telah memindahkan jumlah RM300,000 itu dengan salah dan mengkreditkannya ke dalam akaun Malrich Holdings Bhd ('Malrich') kononnya di bawah suatu lien yang memihak kepada Bank itu sebagai suatu sandaran untuk pinjaman yang diberikan kepada Malrich. Plaintif telah menegaskan bahawa tindakan Bank itu mengeluarkan jumlah RM300,000 dari akaun simpanan tetap itu dan mengkreditkannya ke dalam akaun Malrich merupakan suatu perbuatan konversi oleh pihak Bank itu. Bank itu menafikan perbuatan konversi yang dikatakan itu dan mengata bahawa plaintif telah memberi kebenaran kepada Bank itu untuk mengeluarkan RM300,000 dari akaun simpanan tetap itu supaya dibayar ke dalam akaun Malrich seperti yang diarahkan dan dipersetujui oleh plaintif di dalam suatu dokumen yang bertarikh 22 Oktober 1982 ('surat plaintif itu'). Soalan undang-undang di hadapan mahkamah adalah: (i) sama ada resit simpanan tetap itu telah mewujudkan suatu lien yang sah yang memihak kepada Bank itu sebagai cagaran untuk kemudahan overdraf yang diberikan oleh Bank itu kepada Malrich; dan (ii) sama ada tindakan Bank itu yang mengeluarkan simpanan tetap itu atas alasan bahawa terdapat suatu lien adalah salah di sisi undang-undang.

Diputuskan, menolak permohonan plaintif itu:

(1) Sebarang wang yang telah dikreditkan ke dalam akaun seorang pelanggan bank mewakili hutang bank itu kepada pelanggan itu. Bank itu tidak mempunyai sebarang lien ke atas hutangnya sendiri kepada pelanggan itu, walaupun pelanggan itu mungkin mempunyai suatu akaun lain di dalam bank yang sama yang telah terlebih keluar atau dibekukan. Walau bagaimanapun, bank itu mempunyai suatu lien am ke atas semua cagaran yang disimpan oleh seseorang pelanggan di dalam bank itu.

(2) Di mana seseorang pelanggan memberi arahan bertulis kepada suatu pihak ketiga meminta supaya pihak ketiga itu membayar

bank pelanggan itu jumlah yang terhutang dan yang kena dibayar oleh pihak ketiga itu kepada pelanggan itu, jumlah itu tertakluk kepada suatu lien. Di dalam kes ini, adalah jelas bahawa simpanan tetap itu tidak tertakluk per se kepada suatu lien, tetapi jika simpanan tetap itu dipertimbangkan bersama dengan surat plaintif itu, boleh dihujahkan bahawa Bank itu mempunyai suatu lien ke atas wang yang disimpan dalam akaun simpanan tetap itu. Bagaimanapun, mahkamah lebih cenderung memutuskan bahawa wang yang disimpan dalam akaun simpanan tetap itu merupakan cagaran untuk pembayaran sebarang wang yang dihutang oleh Malrich kepada Bank itu. Surat plaintif itu juga memberi Bank itu kebebasan untuk mengeluarkan simpanan tetap itu dan menggunakan wang itu untuk menyelesaikan jumlah yang terhutang oleh Malrich tanpa merujuk kepadanya (plaintif itu).

(3) Oleh itu, jika jumlah di dalam akaun simpanan tetap itu telah dikeluarkan dan dikreditkan ke dalam akaun Malrich mengikut terma surat plaintif itu, tindakan Bank itu adalah sah di sisi undang-undang.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–487–93.]

Cases referred to

1 *Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd* [1971] 1 QB 1; [1970] 3 All ER 473 (CA); [1972] AC 785; [1972] 1 All ER 641 (HL) (not folld)

2 *Manuel Misa v Raikes Currie, G Grenfell Glyn & Ors* (1876) 1 App Cas 554 (not folld)

3 *Re The Firm of TSN* [1935] MLJ 139 (refd)

Prasad Abraham (*Prasad Abraham & Associates*) for the plaintiff.
S Achan (*Tengku Mohamed Achan & Lim*) for the defendant.

Zakaria Yatim J: In this application, the plaintiff is asking the court to decide on a question of law before the trial of the action. The question is as follows: whether a Fixed Deposit Receipt No 000762 which was renewed several times, the last number being 003819, created a valid lien in favour of the defendant ('the Bank') as security for an overdraft facility which was granted by the Bank to a third party, Malrich Holdings Bhd; and secondly, whether the act of the Bank in uplifting the said fixed deposit on the ground that there was a lien was bad in law.

The plaintiff, in her statement of claim averred that on 9 October 1982 she deposited with the Bank's branch at Taman Maluri, Cheras, a sum of RM300,000 on fixed deposit for 12 months and the Bank issued a Fixed Deposit Receipt No 000762. The interest rate was 10.5%pa. The fixed deposit was renewed by the plaintiff a number of times. The last renewal was on 25 July 1988 for a period of three months and the rate of interest was 6.75%pa. The receipt number was 003819. The plaintiff alleged that

on 11 October 1988, the Bank uplifted the fixed deposit without the plaintiff's consent or authority, and wrongfully transferred the said sum of RM300,000 pursuant to an alleged lien in favour of the Bank as a pledge for a loan granted to a third party. The plaintiff contended that the Bank's action in uplifting the said sum of RM300,000 in the fixed deposit and crediting it to the account of a third party amounted to an act of conversion on the part of the Bank.

The Bank, in its statement of defence, denied the alleged act of conversion. According to the Bank, the plaintiff had given her consent and approval to the Bank to uplift the RM300,000 in the fixed deposit and the money had been used to pay into the account of a third party, Malrich Holdings Bhd as directed by and agreed upon by the plaintiff in the 'lien document' dated 22 October 1982.

For the purposes of the present application, the agreed facts are as follows:

(1) The plaintiff maintained the said fixed deposit with the Bank which was renewed on several occasions.
(2) The fixed deposit was uplifted by the Bank.
(3) The plaintiff had executed a letter in favour of the defendant whereby the plaintiff agreed that the defendant was at liberty at any time to withdraw the deposit and to apply the proceeds thereof towards the discharge of any amount owing on the account of Malrich Holdings Bhd.

The first question for the court to consider is, what happens when a person puts his money in a fixed deposit account in a Bank. Mr Prasad Abraham, counsel for the plaintiff, in his written submission contended that the money deposited with the Bank could not constitute a security over which it could exercise a lien as the fixed deposit represented the Bank's indebtedness to the plaintiff. In support of his contention, he referred to the dictum of Buckley LJ in *Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd*[1] (Court of Appeal) at p 46 and the speech of Lord Cross of Chelsea in the same case in the House of Lords at p 810.

Mr S Achan, counsel for the Bank, submitted that a fixed deposit account could be the subject of lien. In support of his submission, he referred to a passage in the speech of Lord Hatherley in *Manuel Misa v Raikes Currie, G Grenfell Glyn & Ors*[2] at p 569. Mr S Achan said that *Manuel Misa*[2] was cited with approval in a local case, *Re The Firm of TSN.*[3]

I shall now examine the cases referred to by both counsel for the plaintiff and for the Bank.

In *Manuel Misa*,[2] the facts were that Lizardi, who carried on extensive business largely in bills upon foreign countries, had good credit in the city. He had two accounts with the respondents, namely, a loan account and a drawing account. He sold to Manuel Misa four bills of exchange drawn by himself upon one Manuel F Paul of Cadiz. The bills of exchange were sold on 11 February 1873 and were to be paid for on the first foreign post day following the day of sale. The first day was 14 February 1873. By that time Lizardi was much in debt to his bankers. On being pressed by his bankers

A to reduce the balance, Lizardi gave the bankers a draft on order on Manuel Misa dated 14 February 1873. The draft on order was as follows:

> M Misa Esq
> 41 Crutched Friars London, 14 February 1873
>
> B Please ... pay to Messrs Glyn, Mills & Co, or bearer, the sum of nineteen hundred and ninety nine pounds three shillings, for bills negotiated to you last post.
>
> £1,999 3s F De Lizardi & Co

C On the morning of 14 February 1873, Manuel Misa gave a cheque for the amount of the order. The amount was then entered in the Bank's book to the credit of Lizardi. The Bank then sent the cheque to the clearing house and presented it for payment, but payment was stopped by Lizardi. Lizardi then absconded and was subsequently declared a bankrupt. The Bank then brought an action against Manuel Misa. The House of Lords decided that D the Bank was entitled to recover the amount from Manuel Misa. In his speech at p 568, Lord Hatherley said:

> All that can be said about the transaction is this, Lizardi being hard pressed by Messrs Glyn for securities, represented to them that he had a debt of £1,999 3s due to him from Misa, and he says to his bankers, Messrs Glyn & Co: 'I will do E this in order that you may be quite safe; this debt is not payable until 14 February, and I cannot give you any right to receive it until that day, because it is not due until then; you know that as well as I do; but in order to give you all possible security I will leave this document at your bank, so that on 14 February, the day when the money becomes due, you may be in a position to go and demand payment of it.' I apprehend, my Lords, that that is much more the character of F the transaction than holding it as a mere authority for the collection of the money. If it were necessary so to hold, I should be prepared to hold that Messrs Glyn had a right of lien — holding this document in their hands until the time came when they could call on Misa to make the payment under Lizardi's contract. It was a document which they might present to Mr Misa to have the word 'accepted' written across it, or to have the payment made according as they G were disposed to do.

At p 569, Lord Hatherley went on to state:

> Of course he must have been perfectly well aware that all moneys paid into a bank are subject to a lien, and that all documents as well as moneys deposited with a banker may be subject, on the banker's part, to a lien in respect of any H balance that may be due to him from his customer.

Mr S Achan referred to the above passage in his submission.

The above passage was cited with approval in *Re The Firm of TSN*.[3] In that case, Whitley J recognized that the language used by Lord Hatherley in the passage quoted above was very wide, but he felt that there was no I reason for restricting the generality of the words.

In *Re The Firm of TSN*,[3] the Bank's customers had an account with the Bank at its branch in Penang. They were also liable to the Bank in respect of indebtedness to the Bank's branches in Medan and Rangoon. Valuable

securities were from time to time deposited by the customers with the Bank in Penang. The customers were adjudicated bankrupt. Part of the securities were realized and part of the customers' liabilities were discharged. The official assignee claimed to redeem the remaining securities. The Bank claimed to hold the remaining securities until all the indebtedness of the customers were discharged. Whitley J decided that the Bank had a general lien upon the securities deposited with the Bank in Penang and that such lien extended to cover any indebtedness of the customers at the Rangoon branch.

In *Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd*,[1] the plaintiff company had a single loan account overdrawn by £11,339 at a branch of the defendant bank. It had a trading account in credit at Lloyd's Bank. After a meeting held between the representatives of the plaintiff and the defendant bank, it was agreed that the Lloyd's Bank account was to be transferred to the defendant bank. The existing overdrawn account (No 1 account) was frozen. The account transferred from Lloyd's Bank became a No 2 account. On 12 June 1968, a cheque for £8,611 drawn in favour of the plaintiff was paid in for the credit of the No 2 account. On the same day, the plaintiff went into voluntary liquidation and a liquidator was appointed. The liquidator requested the defendant bank to pay over the credit balance of the No 2 account but his request was refused. The plaintiff sued the defendant bank. Roskill J gave judgment in favour of the defendant bank. The plaintiff appealed. The Court of Appeal allowed the appeal (Buckley LJ dissenting). The matter went to the House of Lords which agreed with Buckley LJ and reversed the decision of the Court of Appeal.

Buckley LJ in his judgment at p 46 said that a lien did not exist in that case. In his judgment on the same page he said:

> When that cheque was cleared, as it was on 14 June 1968, it ceased to be a negotiable instrument and also ceased to be in the possession of the bank. Any lien of the bank on the cheque must thereupon have come to an end. The amount of the cheque was credited to the No 2 account on 13 June 1968. The money or credit which the bank obtained as the result of clearing the cheque became the property of the bank, not the property of the company. No man can have a lien on his own property and consequently no lien can have arisen affecting that money or that credit. The amount of the credit of the company upon the No 2 account was, of course, increased, but this credit represented indebtedness by the bank to the company as its customer, and I cannot myself understand how it could be said with any kind of accuracy that the bank had a lien upon its own indebtedness to the company. It has, of course, long been recognized that a banker has a general lien on all securities deposited with him as banker by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with lien: see *Brandao v Barnett* (1846) 3 CB 519, per Lord Campbell at p 531. The term 'securities' is no doubt used here in a wide sense, but does not, in my judgment, extend to the banker's own indebtedness to the customer.

Lord Denning MR was of the view that a banker's lien was no true lien and he preferred not to use the word lien at all. In his judgment at pp 33 and 34, he said:

A I cannot help thinking that the use of the word 'lien' in this context is misleading. The lien which we call a 'banker's lien' has no resemblance to any other kind of lien. In the ordinary way a lien gives a creditor a right to retain possession of a thing until his account is paid. If the creditor lets it out of his possession he loses his lien. The creditor has no right to sell the thing or dispose of it. He is only entitled to retain possession. But when a banker has a lien over a cheque
B belonging to a customer or its proceeds, it means that the banker can retain the cheque or its proceeds until the customer has paid the banker the amount of his overdraft; and the banker can realize the cheque and apply the proceeds in discharge pro tanto of the overdraft. The banker does not lose the lien by allowing the customer to draw against the proceeds. That only means that he has released his lien to that extent. The result is that in the ordinary way, when a
C customer has one account with the bank which is in credit, and another which is in debit, the banker has a 'lien' on the credit in the one account which entitles him to apply that credit in discharge of indebtedness on the other account.

Seeing that the banker's lien is no true lien, in order to avoid confusion, I think we should discard the use of the word 'lien' in this context and speak simply of a banker's 'right to combine accounts': or a right to 'set off' one
D account against the other.

In the House of Lords, Lord Cross of Chelsea said at p 810 as follows:

I agree with Lord Denning MR and Buckley LJ [1971] 1 QB 1 at pp 33–34 and 46 that a debtor cannot sensibly be said to have a lien on his own indebtedness to his creditor. It may be that as a matter of history the recognition by the courts
E of the right of a banker to treat several account as one was influenced by their earlier recognition that in the absence of agreement to the contrary a banker had a lien on all securities in his hands for the general balance owing to him on all accounts. But to describe the right to consolidate several accounts as an example of the banker's lien is, I think, a misuse of language.

F In my view, the authorities referred to above laid down, inter alia, the following principles:

Any money credited into the account of a customer in a bank represents indebtedness by the bank to the customer. The bank has no lien upon its own indebtedness to the customer, even if the customer has another account in the same bank which is overdrawn or frozen. The bank, however, has a
G general lien on all securities deposited with the bank by a customer. Where the customer gives instructions in writing to a third party requesting the third party to pay the customers' bank the sum due and owing by the third party to the customer, that sum is subject to a lien.

Applying the above principles to the present case, it is clear that the fixed
H deposit per se is not subject to a lien. If the fixed deposit is considered together with the plaintiff's letter dated 22 October 1982, it can be rightly argued, following *Manuel Misa*,[2] that the Bank has a lien on the money kept in the fixed deposit.

I am more inclined, however, to hold that the money kept in the fixed deposit is a security for the payment of any money owing by the third party
I to the Bank. This is clearly stated in para 1 of the plaintiff's letter dated 22 October 1982 ('the said letter') which states:

In consideration of your allowing Malrich Holdings Bhd (hereinafter referred to as the customer), at my/our request to overdraft on his/her/their account

> No 0780101225 with you to the extent of RM750,000, I/We hereby deposit with you Fixed Deposit Receipt No 000762 Serial No ... for the sum of RM300,000 (hereinafter referred to as the said sum) as security for the payment to you or the amount now hereafter owing on the said account with you together with interest thereon up to the date of payment.

The said letter also gave the Bank the liberty to withdraw the fixed deposit and apply the proceeds thereof to discharge the amount owing by the third party, without any reference to her. This is clearly stated in the last paragraph of the said letter:

> You are at liberty at any time to withdraw the deposit made under the said [Fixed] Deposit Receipt No 000762 or any fixed deposit receipts from time to time substituted for or replacing the same and to apply the proceeds thereof in or towards the discharge of any amount owing on the said account without reference to me/us.

In my opinion, if the amount in the fixed deposit was uplifted and credited to the account of the third party, Malrich Holdings Bhd, in accordance with the terms of the said letter, the Bank's action was valid in law.

My answer to the question raised in the application is therefore as stated above. I order that the costs of the application be paid by the plaintiff to the Bank.

Order accordingly.

Reported by Anne Khoo